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Erin Cowles**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Appl. No. : 10/828,755 Confirmation No. 5339
Applicant : Miller
Filed : April 21, 2004
TC/A.U. : 2829
Examiner : Paresh H. Patel

Docket No. : P208-US

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

ELECTION

To Whom It May Concern:

In response to the Restriction of September 28, 2006, the shortened statutory period for response to which ends on October 30, 2006 (the first business day following October 28, 2006), Applicants elect with traverse the claims of Group V, namely, claims 33-35. As discussed below, Applicants traverse the restriction on the grounds that the Examiner has not established the burden element necessary to establish a prima facie case for restriction.

As set forth in the MPEP, to establish a case for restriction, the Patent and Trademark Office ("PTO") must show not only that the claim groups are distinct but must also show that "[t]here would be a serious burden on the examiner if restriction is not required." (MPEP § 803.) Applicants respectfully assert that the PTO has not established the burden element for two reasons.

First, the claims that are subject to restriction have already been examined three times and three office actions on the merits have been issued dated March 22, 2005, October 3, 2005, and April 23, 2006. Moreover, two of those office actions—dated October 3, 2005 and April 23, 2006—were issued after each of claims 4, 6, 8, 29, 33, and 36 was put into independent form. Because all of the claims that are subject to the restriction requirement have thus been extensively examined, there cannot be a serious burden on the Examiner to continue to examine

the claims. Indeed, in issuing the prior office actions, the PTO implicitly admitted that there was not a sufficiently serious burden to support a restriction requirement. For this reason alone, the burden element necessary to sustain the restriction has not been met, and the restriction should accordingly be withdrawn.

Second, as set forth in the MPEP, "[f]or purposes of the initial requirement, a serious burden on the examiner may be prima facie shown *by appropriate explanation* of separate classification, or separate status in the art, or a different field of search." (MPEP §§ 803 and 808.02 (emphasis added).) The PTO has acknowledged that all six groups have the same classification, namely, class 324, subclass 754.

Moreover, the PTO has not provided support for the otherwise conclusory statement that each of the six groups has "acquired a separate status in the art because of their recognized divergent subject matter." Absent a showing or evidence to support the assertion that the subject matter of each of Groups I through VI is recognized in the field or industry as divergent, the assertion that the subject matter of Groups I through VI is recognized as divergent must be withdrawn. Certainly a mere conclusory statement that each of the six groups has "acquired a separate status in the art because of their recognized divergent subject matter" does not amount to the "appropriate explanation" required by the MPEP. The PTO has thus not established that the subject matter of each of Groups I through VI has acquired a separate status in the art.

In addition, although the PTO alleges the need for a different field of search, the PTO has not substantiated that a different field of search would in fact be required. Indeed, the fact that each of Groups I through VI is classified in the same class and subclass shows that different fields of search would not be required. Certainly, where, as here, each group has the same classification, a mere unsupported statement that a different field of search would be required for each of Groups I through VI does not amount to the "appropriate explanation" required by the MPEP.

Moreover, the fact that the subject matter of each Group has already been searched three times by the PTO in conjunction with the previous office actions dated March 22, 2005, October 3, 2005, and April 23, 2006 shows that any further searching required to continue to examine the claims of Groups I through VI would not impose a serious burden. Thus, the PTO has not established that further examination of the claims of Groups I through VI would require different fields of search for each group or that such searching would impose a serious burden.

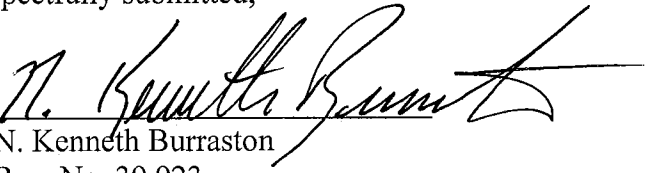
For the foregoing reasons, the PTO has not established any of the three conditions necessary to establish the burden element required to support the restriction. For this additional reason, the restriction should be withdrawn.

If the Examiner believes that a discussion with Applicants' attorney would be helpful, the Examiner is invited to contact the undersigned at (801) 323-5934.

Respectfully submitted,

Date: October 30, 2006

By


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